

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD LIDDELL,

Defendant-Appellant.

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UNPUBLISHED

August 25, 2000

No. 214034

Kent Circuit Court

LC No. 97-009764-FC

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree felony-murder involving larceny, and first-degree felony-murder involving extortion, each pursuant to MCL 750.316(1)(b); MSA 28.548(1)(b). Defendant was sentenced to life imprisonment without parole for each conviction. He appeals as of right. We affirm defendant's conviction of one count of first-degree murder and remand to the trial court so that the judgment of sentence can be modified to specify a single conviction and sentence for first-degree murder supported by three separate theories: premeditated murder, felony-murder involving extortion, and felony-murder involving larceny.

Defendant first argues that error necessitating reversal occurred when the jury was informed through the testimony of various witnesses that he had committed prior bad acts. Because defense counsel did not object to the introduction of this evidence, this issue has not been preserved for appellate review. In order to prevail on a claim of forfeited nonconstitutional error, defendant must show a plain error affecting his substantial rights. Further, this Court will reverse only if defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-554; 520 NW2d 123 (1994). Here, defendant has not shown a plain error affecting his substantial rights, nor is he actually innocent of the crimes charged, and any alleged error does not seriously affect the fairness, integrity, or public reputation of these judicial proceedings. Reversal is therefore not indicated.

Defendant next contends that he was denied a fair trial because the prosecutor asked certain defense witnesses why they had not come forward to the police before trial with information tending to exculpate defendant. Because defense counsel failed to object at trial to the alleged error, and because the requirements of *Carines, supra*, and *Grant, supra*, have not been satisfied, reversal is not warranted.

As his third allegation of error, defendant claims that the prosecutor erred by eliciting at trial from prosecution witness Theresa Patterson that she agreed to testify truthfully in exchange for a plea agreement. Because defense counsel interposed no objection to this testimony, this issue has not been preserved for appellate review. *Carines, supra* at 774. Regardless, by merely eliciting that Patterson was testifying pursuant to an agreement that required her truthful testimony, the prosecutor committed no error. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995).

Defendant next maintains that the admission into evidence at trial of photographs of the victim lying dead in his mobile home constituted prejudicial error because the photographs were irrelevant, inflammatory and merely cumulative of other evidence. The trial court held that although the pictures were gruesome, they were useful to show the size and strength of the perpetrator, the manner in which the crime was carried out, whether there was passion involved, and what injuries caused death. The court concluded that the photos were not calculated to unfairly inflame the jurors and were not duplicative. The court also offered to give a cautionary jury instruction at the time the photographs were admitted, and did so at defense counsel's request.

"The decision to admit or exclude photographs is within the sole discretion of the trial court. . . . The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). Photographs are not excludable simply because a witness can orally testify regarding the information contained in the photos; they may also be used to corroborate a witness' testimony, and gruesomeness alone need not cause exclusion. *Id.* For the reasons discussed by the trial judge, we perceive no abuse of discretion in the trial court's admission of the challenged pictures. *Id.* at 66-80; *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998); *People v Ho*, 231 Mich App 178, 187-188; 585 NW2d 357 (1998); *People v Howard*, 226 Mich App 528, 549-551; 575 NW2d 16 (1997).

Defendant next argues that failure of the police to bring allegedly exculpatory evidence to defense counsel's attention entitles defendant to a new trial. We disagree. On a separate record, Joseph Wright testified that, while he was in jail in August 1997, he overheard three black males discuss how they had been arrested because they had a dead man's car, mention a mobile home, tell about having items of clothing purchased after this man was dead, and indicate "they were there when it went down." Wright claimed that he contacted the police a few days later and spoke with detective David Peuler. In response to the trial court's inquiry, Wright stated that the three black males did not "straight out" acknowledge committing the murder, but that is how he interpreted their remarks. Detective Peuler testified that he spoke with Wright on August 14, 1997, and Wright never mentioned that any of the people with whom Wright talked were witnesses to the killing. Peuler was unable to verify any of the information Wright had given him. He conceded that no report was prepared regarding the police investigation of Wright's story, but averred that the names of the individuals Wright apparently

overheard, and the police reports regarding them, were turned over to defense counsel. At the conclusion of the hearing, the trial court found no violation of any defense discovery request.

A defendant has a due process right of access to exculpatory information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998), this Court stated:

In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

A reasonable probability of a different result exists where suppression of the evidence undermines confidence in the outcome of the trial. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998).

Plaintiff concedes that “[t]he police officers should have prepared a report,” noting that “it is not the function of the police to determine what evidence is relevant or is not relevant, or even whether something will or will not be admissible as evidence.” However, plaintiff maintains that defendant was not harmed by this omission. We agree. Defendant has failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had the police prepared a report of their investigation of Wright and furnished it to defense counsel. This conclusion is confirmed by the fact that when the trial court offered to allow Wright to testify at trial if there was any admissible testimony he could give, defense counsel stated, “There’s nothing admissible that he could testify to, your Honor.” Under the standard of review for preserved constitutional error enunciated in *Carines*, *supra* at 774, plaintiff has successfully demonstrated that any error is harmless beyond a reasonable doubt. Reversal is therefore unnecessary.

Defendant next contends that error occurred when detective Michael Duke testified that he questioned Theresa Patterson after the crime and she made an incriminating statement identifying defendant as the person who beat Gordon Scoville. Because defendant failed to object at trial to the challenged statement, this issue has not been preserved for appellate consideration, and reversal is not required under the standard set forth in *Carines*, *supra* at 774.

Defendant further alleges that the trial court erred in failing to sua sponte give a cautionary instruction to the jury regarding Theresa Patterson’s testimony as either a disputed or undisputed accomplice. Again, because defense counsel failed to request an accomplice witness instruction and in fact expressed his approval of the instructions as given, this issue has not been preserved for appellate review and defendant must meet the *Carines* standard. Defendant has failed to establish plain error because the issue was not “closely drawn,” and the trial court was not required to sua sponte give a cautionary instruction. *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974).

Defendant next contends that he was denied the effective assistance of counsel at trial. Defendant failed to move for an evidentiary hearing regarding this matter, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), and this Court's review is therefore limited to the facts contained on the record, *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceedings was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant first argues that he was denied the effective assistance of counsel because his trial attorney failed to request a limiting instruction regarding alleged other-acts evidence involving defendant, and because he failed to request an accomplice instruction regarding Theresa Patterson's testimony. In neither instance has defendant demonstrated that there exists a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different, or that the result of the proceedings was fundamentally unfair or unreliable. Reversal is therefore not warranted on this basis.

Defendant also maintains that his counsel erred by failing to object to other-acts evidence involving defendant. Again, defendant has failed to demonstrate that elements (2) and (3) of the test for establishing ineffective assistance of counsel have been satisfied and, accordingly, reversal is not warranted.

As his final contention of ineffective assistance, defendant claims that his attorney erred by failing to object to Detective Duke's testimony regarding what Theresa Patterson told him concerning defendant's commission of the murder. Defendant has failed to show a reasonable probability that, but for counsel's alleged error, the result of these proceedings would have been different, nor has he demonstrated that the result of these proceedings was fundamentally unfair or unreliable. Reversal is therefore not indicated.

Defendant next claims that he is entitled to a new trial because the jury verdict is against the great weight of the evidence. After trial, defense counsel filed a "motion for acquittal," essentially arguing that Theresa Patterson's testimony was unreliable in several particulars and that defendant therefore deserved to be acquitted of the crimes charged. The trial court denied this motion, stating:

The issues that are being raised in this motion were raised at time of trial in a variety of ways, and it really gets down to do you believe Miss Patterson or not, and the jury elected to believe her. I think they had good reason to elect to believe her. That's their decision, it's not mine. If they believe her, if they believe the testimony that she presented, and she was – if you believe that testimony, essentially an eyewitness to this, clearly there's sufficient evidence to support these verdicts. So, respectfully, the motion is denied.

This Court reviews the trial court's decision for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Issues of witness credibility are for the jury and, absent exceptional circumstances, a trial court may not substitute its view on credibility for that of the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Here, Patterson's testimony was not so patently incredible or inherently implausible that it could not be believed by a reasonable juror. *Id.* at 643-644. Accordingly, the trial court did not abuse its discretion in denying defendant's motion.

As his final allegation of error, defendant argues that his mandatory nonparolable sentence of life imprisonment for first-degree murder is a "determinate" sentence by nature and is therefore impermissible, and that his sentence constitutes cruel or unusual punishment pursuant to Const 1963, art 1, § 16. This allegation is without merit. The law is settled that a sentence of mandatory life imprisonment without parole does not violate the United States or Michigan Constitution. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Launsbury*, 217 Mich App 358, 363-365; 551 NW2d 460 (1996).

The judgment of sentence states that defendant was convicted of, and sentenced to life imprisonment for, "open murder," felony-murder involving larceny, and felony-murder involving extortion. However, it is well settled that multiple murder convictions arising from the killing of one victim violates double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). We therefore remand this case to the trial court and direct that it modify the judgment of sentence to specify a single conviction and sentence for first-degree murder supported by three separate theories: premeditated murder, felony-murder involving extortion, and felony-murder involving larceny. *Id.* at 222. The trial court shall also send a copy of the modified judgment of sentence to the Michigan Department of Corrections. Defendant's conviction and sentence are affirmed in all other respects.

Affirmed and remanded for modification of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra